
HEARING COMMISSIONER - ANTI DISCRIMINATION
COMMISSIONER FOR THE NORTHERN TERRITORY

FUNNELL V KUNBALLANJNJA COMMUNITY GOVERNMENT COUNCIL (NO 3 OF 1996)

Reasons for decision - costs

On 24 October 1996 I handed down my decision in the matter of the claim by Constable Brett Funnell that he had been victimised by Kunballanjnja Community Government Council. I found that Constable Funnell had been victimised.

At the end of the written reasons for that decision I noted that at the request of one of the parties I would leave the issue of costs to be determined at a later time. In doing so I did indicate my basic position. It was that parties should bear their costs excepting where costs have had to be unnecessarily incurred because of some unreasonable action of the other party. I invited the parties to make submissions.

Since that time the parties have made written submissions concerning costs. In brief Constable Funnell claims costs. This claim is opposed by the Kunballanjnja Community Government Council.

Constable Funnell claims costs on the following basis:

- Kunballanjnja Community Government Council failed to attend conciliation conferences proposed for 26 March 1996 and for 2 September 1996
- Kunballanjnja Community Government Council filed a defence 11 days late and gave as an excuse for the delay the fact of the death of the former President of the Council. Constable Funnell says that the President died one week after the date when the defence should have been filed
- Kunballanjnja Community Government Council forced the delay in the final hearing because of an untrue submission that there had been a death in the community. This meant that it was not possible to hold the hearing on 26/27 August 1996
- the evidence of Mr Tom Kairupan was "malicious and unreasonable" the case involved a set of complex issues of public importance and thus, in accordance with Sinnapan's case, should be the subject of a cost's award. The suggested "complex" issues related to the fact that this hearing was the first hearing on issues under the *Anti Discrimination Act* relating to vicarious liability and victimisation.

Kunballanjnja Community Government Council argues that:

- there are no "exceptional circumstances" as to justify the awarding of costs
- in respect of the postponement of the hearing this was not an "exceptional circumstance" because "it did not reflect adversely on the Respondent".

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The general principle to be applied in determining costs is set out in section 96 of the Anti Discrimination Act. This provides as follows:

"(1) Subject to subsection (2) and section 80 [failure to attend conciliation conference], each party to a complaint shall pay his or her own costs in respect of proceedings under this Act.

(2) Notwithstanding subsection (1), the Commissioner may make an order as to costs".

As mentioned in my reasons for decision, I take these provisions to mean that costs should only be awarded where one of the parties has caused the other party costs because of some unreasonable action. More precisely and after considering the submissions, the position is that costs should only be awarded in exceptional circumstances. Thus the general practice should be that each party bears their own costs. The "exceptional circumstances" would exist if, for example, one of the parties had attempted some kind of fraud or improper concealment or had taken some extreme action which caused the other party unnecessary expense or had engaged in vexatious activity.

In this matter I find that the Kunballanjja Community Government Council did not, excepting on one occasion, engage in any conduct which would mean that any exceptional circumstance exists that would justify me departing from the general principle that parties must bear their own costs. In terms of most of the submissions made I make the following findings:

- there was no direction under section 80 that there be a conciliation conference. Therefore, the duty to consider awarding costs under that section does not apply. Additionally, I do not consider that a general failure to co-operate for the purposes of conciliation is a ground for the awarding of costs.
- the late filing of a defence is not an exceptional circumstance unless, at a minimum, it can be shown that the lateness caused some cost to the Constable Funnell. If this could be shown (which it was not) then there might be some need to investigate the reasons for the late defence.
- I do not consider that the case raised particularly complex or novel legal issues. Nor am I convinced that under the Territory Act there is any particular reason why the losing party should be made to bear the costs of arguing novel issues.
- that the evidence of Mr Tom Kairupan was not such as mean that there is an "exceptional circumstance". It was unexceptional that there was evidence that there were other reasons (than the anti discrimination complaint) for the sending of the letter. I make this finding notwithstanding the fact that Kunballanjja Community Government Council provided little credible evidence or excuses as to the real reasons for the existence of the letter and the conversations that formed the basis of the allegation of victimisation. The lack of a credible defence to the allegation combined with the telling of exaggerated tales about the relationship between Constable Funnell and the community do not, of themselves, make for exceptional circumstances. I found that Mr Kairupan gave an exaggerated account

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of what might have been the reasons for the sending of the letter given that he did not have first hand knowledge as to why the original letter was sent.

The one exceptional aspect is that of the additional interim hearing and the delay caused to the time of the final hearing because the Kunballanjja Community Government Council advised of the death of a senior person in the community. This application was brought on and considered by the Commissioner as a matter of urgency. In my view later events showed that there was no death of any relevance to the date of the hearing of the complaint.

Accordingly, I find that Kunballanjja Community Government Council should be liable for only the party/party costs on the scale used by the Local Court caused to Constable Funnell:

1. In having to brief lawyers to attend the hearing before Commissioner Lawrie relating to the postponement of the final hearing
2. In matters consequential to that postponement.

These costs should be as agreed or in the absence of agreement should be as taxed by me or by a person agreed to by the parties.

Robert Bradshaw
Hearing Commissioner

9 May 1997